Supreme Court of the United States

OCTOBER TERM, 1946

No. 696

Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

AARON ROSENZWEIG,

Petitioner,

vs.

GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA; BERNARD L. BOUTIN, ADMINISTRATOR,

Respondent.

Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.

Petitioner prays that a Writ of Certiorari to review the judgment of the United States Emergency Court of Appeals entered in the above entitled case on December 6, 1961.

Citations to Opinion Below.

The opinion of the Emergency Court of Appeals is as yet unreported. It is printed in Appendix B hereto, *infra*, pages 9-23.

On rehearing, the United States Emergency Court of Appeals modified the opinion slightly by its order dated January 2, 1962, which order is printed in Appendix B hereto *infra* page 24, but otherwise denied the petition for rehearing.

Jurisdiction.

The judgment of the United States Emergency Court of Appeals was entered on December 6, 1961, Appendix 43, pages 23-24, *infra*. A rehearing was denied by the Emergency Court of Appeals on January 2, 1962, Appendix 43, page 24, *infra*. The jurisdiction of this court is invoked under 50 U. S. C. App. Sec. 924(d), 50 U. S. C. App. Sec. 2108, 50 U. S. C. App. Sec. 1894, and 28 U. S. C. Sec. 1254(1).

Questions Presented.

1. Can respondent determine a partnership entity to be "in wilful violation" of price regulations and therefore invalidate subsidy claims made by the partnership entity, based upon criminal convictions of two partners thereof?

2. Was the respondent's finding that a partnership entity was in "wilful violation" of price regulations supported by the evidence presented?

3. Can a partnership entity under the price control laws be charged with "wilful violations"?

4. Is the order of the respondent herein finding the partnership in "wilful violation" of price regulations unconstitutional, in that it deprives petitioner of his property without due process of law and holds the petitioner to be liable for the criminal acts of his co-partners without showing his participation in the criminality, where petitioner is foreclosed henceforth from challenging that order?

Statutes and Regulations Involved.

The statutory provisions involved are the relevant sections of the Emergency Price Control Act, Public Law 421, 56 Stat. 23 *et seq.* 50 U. S. C. App. 901 *et seq.* as amended. The regulations under this Act involved are regulations of the Defense Supplies Corporation and the Office of Economic Stabilization at 8 Fed. Reg. 10820; 10 Fed. Reg. 4241; 10 Fed. Reg. 4494; 12 Fed. Reg. 2408; and the Regulations of successor Agencies. The pertinent provisions of the Regulations and Statutes are printed in Appendix *A infra* pages 1-8.

Statement.

The statement of facts contained in the opinion of the United States Emergency Court of Appeals contains an admirable summary of the pertinent facts herein and is hereby adopted. Such statement reads as follows:

> During 1944 Charles M. King, Hyman Stillman and Lou Segal entered into a partnership arrangement known as Southern California Meat Company No. 2. Allied in this enterprise was Southern California Meat Co., Inc., a corporation principally owned by King. Southern California Meat Co., Inc. was to slaughter cattle and Southern California Meat Company No. 2 was to sell the meat. It appears that Southern California Meat Company No. 2 charged overceiling prices on the sale of meat and due to difficulties in obtaining subsidy payments the use of Southern California Meat Company No. 2 was abandoned.

In place of the previous partnership arrangement, Southern California Meat Co., Inc., King, Stillman and Segal late in 1944 entered into a similar arrangement under the name of Central Packing Company. The name, Central Packing Company, was that of an existing business owned by the complainant, which had a slaughtering license. The Central Packing Company had a clean meat purchasing and selling record on the basis of which Stillman, Segal, King and King's corporation, Southern California Meat Co., Inc., could claim and receive subsidy payments. During February and March, 1945, Central Packing Company filed applications with Defense Supplies Corporation pursuant to Revised Regulation No. 3, for cattle slaughter subsidy payments in the aggregate sum of $143,303.40. These subsidy claims, signed by the complainant as "Owner", and paid by Defense Supplies Corporation to Central Packing Company, are the subject of this controversy.

During February 1946, Southern California Meat Co., Inc., King, Stillman and Segal were indicted in the United States District Court for the Southern District of California, Central Division, No. 18,300, for violations of and conspiracy to commit violations of the Emergency Price Control Act of 1942 and the applicable regulations promulgated thereunder. It was charged that these defendants operated under the firm names of Southern California Meat Co., Inc., Southern California Meat Company No. 2, and Central Packing Company, and that they shared in all gains and profits accruing from the illegal activities described in the indictment. Among the overt acts were those

charging the defendants with the issuance, during February and March, 1945, of certain invoices of Central Packing Company showing that meat had been sold at overceiling prices. On July 5, 1946 all four defendants were found guilty and judgments were entered against them. The complainant, while admittedly associated in the business of Central Packing Company, was never indicted or found guilty of any connection with such activities.

On December 23, 1947 a letter-order was sent by Reconstruction Finance Corporation, the agency then in charge of such matters, addressed to Central Packing Company, in care of the complainant, stating that, as the result of an investigation, its subsidy claims were being declared invalid for the periods August 1944 through April 1945. Accordingly, demand was made for reimbursement of the sum of $190,962.62, plus interest. Under dates of January 7 and 9, 1948, the complainant requested information with respect to the basis on which these claims were declared invalid. The parties treated the letter of January 9, 1948 as a formal protest against the letter-order of December 23, 1947. Under date of January 16, 1948 the complainant was advised that the case had been referred to the U. S. Department of Justice and was being handled by the Legal Division of Reconstruction Finance Corporation.

No further action was taken until May 1958 when the United States filed a civil action, No. 423-58-BH, in the United States District Court for the Southern District of California, Central

Division, against King, Stillman, Segal and the complainant, doing business as Central Packing Company, and Southern California Meat Co., Inc., for the recovery of the subsidy payments in question. Default judgments were entered against defendants Stillman and Segal. The action against King and Southern California Meat Co., Inc., was dismissed. The action against the complainant was dismissed without prejudice on the ground that a protest against the letter order of December 23, 1947 was still pending. Under date of June 27, 1949 the complainant wrote General Services Administration, the Administrator of which was the successor to Reconstruction Finance Corporation, seeking a determination of the pending protest and attacking the validity of the order on the ground that the complainant had not violated any applicable statutes or regulations.

Under date of August 4, 1949 the respondent informed the complainant that the claims of Central Packing Company for the period from August 1944 through January 1945 in the amount of $853,659.22 were being reinstated but that the February and March 1945 claims remained invalid because of the wilful violations of the Office of Price Administration regulations by Central Packing Company during those two months, which violations were confirmed by the criminal judgments entered against Segal and Stillman. The letter further stated that inasmuch as the Government had not been successful in its efforts to obtain restitution from Segal and Stillman of the meat subsidy payments made to Central Packing Company, and since the complainant was a partner in Central

Packing Company, demand was being made on complainant for restitution of the sum of $143,303.40, plus interest. This letter was treated by the respondent as a new order invalidating the claims and seeking recapture of the money paid to Central Packing Company, which superseded the letter order of December 23, 1947. On August 15, 1950 the complainant protested the letter-order of August 4, 1950 pointing out that neither he nor Central Packing Company had been indicted or convicted in the criminal proceeding referred to and that there never was any determination, judicial or administrative, that Central Packing Company or the complainant himself was in wilful violation of the regulations. Correspondence subsequently passed between the complainant and the respondent in which each expressed his views in respect to the liability of Central Packing Company and the complainant for restitution of the subsidy payments in question. The complainant's protest was denied on December 7, 1950 and the validity of the letter-order of August 4, 1950 is here for review.

The jurisdiction of the Emergency Court of Appeals was invoked pursuant to the Emergency Price Control Act, Section 204 (50 U. S. C. App., Sec. 924) which permits the Emergency Court of Appeals to hear appeals from protests from price control orders or regulations.

The court below dismissed the complaint by petitioner seeking review of the order of respondent upon the authority of *Jaia v. Bowles*, 152 F. 2d 720. In that case, which was a civil action for violations of price reg-

ulations, the court held that under the law of California a partnership is not an entity distinct from its members.

The court below found that the order of the respondent did not determine petitioner's liability for restitution if petitioner is subsequently determined to be a partner, and that the liability, if any, of the petitioner to pay any debt which the partnership entity might owe to the United States Government may be determined in a separate action for restitution which may hereinafter be brought by the Government against the complainant in a proper court. The court below then pointed out that in such a separate proceeding the petitioner would have an opportunity to assert any defenses to the Government's claim against him, except the validity of the respondent's determination of the invalidity of the subsidy claims involved. The court below later modified some language in the opinion as to what the possible law might be in such an independent proceeding. (See order on denial of petition for rehearing, *infra*, Appendix B, page 24.)

Judgments of the United Emergency Court of Appeals are reviewable by this Court in the exercise of its certiorari jurisdiction. (50 U. S. C. App. 924(d).)

Reasons for Granting the Writ.

I. The decision of the court below in the instant case appears to be in conflict with the decisions of the United States Supreme Court, *United States v. A. & P. Trucking Co.*, 358 U. S. 121, and *Gordon v. United States*, 347 U. S. 909. In *Gordon v. United States*, 347 U. S. 909, this Court held that a co-partner is not responsible for the criminal acts of his co-partner, absent his knowledge or participation in such

act. In the *United States v. A & P Trucking Co.*, 358 U. S. 121, it was held by this Court that a partnership entity, at common law, is not indictable or chargeable with crime, and that in the absence of particular statutory language permitting indictment of a partnership for a crime, a partnership entity is "still considered not indictable." The court in the *United States v. A & P Trucking Co.*, found such particular language in the pertinent statutes involved in that case. The Court further noted that if a partnership entity is found liable, non-participating partners may not be held responsible therefor, for penalties, fines and other punishment.

In the facts at bar, respondent is relying upon the criminal convictions of two co-partners for its finding that the partnership entity was in "wilful violation" of the price regulations, thereby disallowing subsidy claims, notwithstanding that neither petitioner nor entity was named as such in the criminal proceedings and were not found guilty of the acts found to be criminal. The determination by respondent that an applicant for subsidies is in "wilful violation" of price regulations is substantially based upon criminal behavior. An examination of the regulations in question reflects that either a criminal conviction or some proceedings incidental thereto must be taken as a basis for such a finding. A purpose of the subsidy program was to aid the price control program; subsidies were to be denied to those who violated the price control program. Such violators were to be determined in criminal proceedings. The court below relies on *Jung v. Bowles*, *supra*, which held that a partnership entity is not distinct from the partners thereof for the purposes of civil proceedings. However, the court has misconstrued the

essential nature of the proceedings in the instant case, which are highly tainted with criminality." As for criminal proceedings, the law has treated partnership entities separate and distinct in many cases from its members. See *Gordon v. United States*, *supra*; *United States v. A. & P. Trucking Co.*, *supra*; *People v. Mahan*, 34 Cal. App. 584, 167 Pac. 537; *People v. Schmidt*, 74 Cal. App. 109, 209 Pac. 413. The regulations herein require activities of a "wilful violations." See *Ecklund v. United States*, 159 F. 2d 81. The *Ecklund* case discusses the differences between civil actions for violations of price regulations such as the case in *Jima v. Bilicke*, *supra*, under sec. 205(d) of the Price Control Act (50 U. S. C. App. 925(d)) and the "wilful violations" necessary to base a criminal action for violation of price regulations.

2. By eliminating the petitioner's right to contest the validity of respondent's order finding the entity to be in "wilful violation" and therefore disallowing the subsidy claim, the petitioner is placed in the position that if he is found to be a partner in the proceeding he may very well be held liable in restitution to the government for debts of the partnership which have been created by criminal acts of two co-partners or his, without any showing that petitioner participated in or acquiesced or had knowledge of the criminal acts. The rule of common law is that a partner is not liable for the criminal acts of a co-partner or agents without a showing that he has knowledge thereof or has participated or acquiesced therein. *Gordon v. United States*, 247 U. S. 669. The only practical purpose of the respondent in seeking the order to invalidate the subsidy claims by the entity was to proceed against the assets of the petitioner since the partnership is defunct and his co-

partners are without any assets. Respondent is trying to do indirectly what it may not do directly, and that is hold the petitioner responsible for the criminal acts of his co partners if he is determined to be a partner.

The provisions of the Emergency Price Control Act, Sec. 204(d) (50 U.S.C. App., Sec. 924(d)) vest exclusive jurisdiction in the Emergency Court of Appeals, and the Supreme Court on review, to consider the validity of orders or respondent. Thus, in a future separate proceeding brought by the Government seeking restitution from petitioner, the petitioner would be foreclosed from contesting the validity of respondent's order. The net effect of this, pure and simple, would be that petitioner could not contest the finding by respondent that the partnership entity had been in "wilful violation" of price regulations. It then follows, logically, that petitioner cannot contest the finding that the entity was indebted to the Government, since the regulations provide that applicants in "wilful violation" must pay back subsidies improperly received. If there is then a partnership debt, it also follows, logically, that petitioner if determined to be a partner, is liable for partnership debts (unless the criminality of the origins of the debt may alter this proposition).

3. That this appeal presents a question as to whether a partner, without a showing of participation in the criminality may be held responsible for a partnership debt, based upon the criminal acts of co partners, and to the extent to which the government may foreclose the defenses of members of partnership in such matters. It is submitted that the procedure followed by the respondent of holding the partnership entity

responsible for criminal acts, such procedure which was supported by the opinion of the court below, would result in an unconstitutional deprivation of the petitioner's property without due process of law, in that, in effect, the petitioner would be held responsible for the criminal acts of his co-partners. If this determination is upheld the entity could be held responsible for any criminal acts of the members of the partnerships, such as embezzlement or misappropriation of funds and the liability in restitution of the innocent partner for the criminal acts of his co-partners would follow. This is especially true in that in many criminal situations with respect to property or money, a correlative civil cause of action exists in those who have been victims. While it is true that the United States Government is the victim here, the holding could be extended to private persons, resulting in a complete reversal of standard common law doctrines.

Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated: January 31, 1962.

Respectfully submitted,

JOSEPH HENRY WOLF and
PAUL WYLER,
Counsel for Petitioner.

APPENDIX A.

Pertinent Statutes.

The Emergency Price Control Act of 1942 (Public Law 421, 56 Stat. 23 *et. seq.*, 50 U. S. C. App. Sec. 901 *et seq.*)

Section 2(a) 50 U. S. C. App. Sec. 902(a): Whenever, in the judgment of the price administrator . . . the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act . . . .

Section 2(c) 50 U. S. C. App. Sec. 902(c): Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States . . . . make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof . . . .

Section 203(a), 50 U. S. C. App. Sec. 923(a): Within a period of sixty days after the issuance of any regulation or order under Section 2/ . . . . any person subject to any provisions of such regulation, order . . . . may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such ob-

jections . . . Within a reasonable time after the filing of any protest under this sub-section, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order . . . in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith . . .

Section 204(a), 50 U. S. C. App., Sec. 924(a): Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c) of this section, specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto

shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

Section 204(b), 50 U. S. C. App. Sec. 924(b): No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) of this section within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until

other final disposition of the case by the Supreme Court.

Section 204(d), 50 U. S. C. App. Sec. 924(d). Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a court of appeals as provided in section 240 of the Judicial Code, as amended. The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court, upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Section 205(e), 50 U. S. C. App. Sec. 925(e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity

for use or consumption other than in the course of trade or business may bring an action either for $50.00 or for treble the amount by which the consideration exceeded the maximum price whichever is greater, plus reasonable attorney's fees and costs as determined by the Court . . .

Pertinent Regulations.

Regulation 3 of the Defense Supplies Corporation, 8 Fed. Reg. 10826, 32 C. F. R., 1943 Supp. effective as of June 7, 1943:

7003.1 Definitions.

a) "Person" means an individual, corporation, partnership, association, institution, or other business entity, or legal successor, or representatives of any of the foregoing. . . .

* * *

k) "Applicant" means any person who files a claim for payment under this Regulation.

* * *

7003.5 Payment of Claims

* * *

d) *Terms of payment.*

. . . On a finding that a claim is invalid or defective, Defense Supplies Corporation shall have the right to require restitution of any payment or part thereof . . .

* * *

Section 7003.10 Right to Declare Claims Invalid

a) *Compliance with other Regulations*

Defense Supplies Corporation shall have the right to declare invalid, in whole or in part, any claim which

does not meet the requirements of this Regulation, and any claim filed by any applicant who, in the judgment of the War Foods Administrator or the Price Administrator has wilfully violated any regulation of their respective agencies applicable to livestock slaughter or the sale or distribution of meat.

Revised Regulation 3 of the Defense Supplies Corporation (superseding the original Regulation 3), *10 Fed. Reg. 1241, 32 C. F. R. 1945 Supp., Sec. 7003, effective as of January 19, 1945.* Identical to the quoted portions of the original Regulation 3, except as follows:

Section 7003.10 Right to Declare Claims Invalid.

(a) *Compliance with other Regulations.*

Defense Supplies Corporation shall have the right to declare invalid, in whole or in part, any claim which does not meet the requirements of this Regulation, and any claim filed by an applicant who, in the opinion of the War Foods Administrator or the Price Administrator has wilfully violated any regulation of their respective agencies applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat.

Directive 11 of the Office of Economic Stabilization (superseding Regulation 3 and Revised Regulation 3 of the Defense Supplies Corporation), *10 Fed. Reg. 4491, 32 C. F. R., 1945 supp. Sec. 8004, effective April 21, 1945.*

Section 7(b), 11. Defense Supplies Corporation is directed to continue its present procedure of declaring invalid, in whole or in part, any claim for subsidy payment filed by an applicant who, in the judgment of

the Price Administrator, has wilfully violated any meat or livestock regulation or order issued by the Price Administrator. Such a judgment shall be made only in the event the alleged violation is referred to the United States attorney for prosecution.

Amendment 11 to Directive 41 of the Office of Economic Stabilization, 12 Fed. Reg. 2408; 32 C. F. R. 1947 Supp. Sec. 4004, effective April 8, 1947:

Section 4004.4 Livestock Slaughter payments (Directive 41) is amended by the addition of the following paragraphs to Section 7(b)(1):

As used in this Section 7(b)(1) the phrase "its present procedure" was intended to and does refer to the procedure by which subsidy funds are withheld from subsidy applicants involved in criminal proceedings. The procedure was and is as follows:

Withholding of subsidy funds from a subsidy applicant involved in criminal proceedings is initially recommended to the Reconstruction Finance Corporation by the Price Administrator only when all three of these factors are present:

(1) The Price Administrator (or his duly authorized representative) has investigated the alleged wilful violation and referred the case to the United States Attorney for the institution of criminal proceedings.

(2) The Grand Jury has returned an indictment or the United States Attorney has filed an information against the subsidy applicant for the alleged wilful violations of any meat or livestock regulation or order issued by the Price Administrator, and

(3) A responsible member of the applicant's management was chargeable with knowledge of the facts alleged to constitute the wilful violation. . . .

After receiving the Price Administrator's recommendation, the Reconstruction Finance Corporation then notifies the applicant as to the specific amount of subsidy funds that are thus to be withheld or recaptured in the event the subsidy applicant has received the funds . . . .

The Reconstruction Finance Corporation is directed to amend its Livestock Slaughter Regulation Number 3 to make it clear that in any instance in which a subsidy applicant may have subsidy funds withheld after termination of the criminal proceedings contrary to the procedure for such withholding described in this Amendment, the applicant may apply for and obtain release of such subsidy funds . . .

APPENDIX B.

Opinion of the United States Emergency Court of Appeals.

United States Emergency Court of Appeals

No. 670

Aaron Rosenzweig, Complainant v. General Services Administration of the United States of America, Bernard L. Boutin, Administrator, Respondent.

Heard at Los Angeles, California May 5, 1961.

Before Maris, Chief Judge and Magruder and McAllister, Judges.

Mr. Paul Wyler, with whom Mr. Joseph Henry Wolf was on the brief, for the Complainant.

Mr. Maurice S. Meyer, Attorney, Department of Justice, with whom Messrs. William H. Orrick, Jr., Assistant Attorney General and Frederick N. Curley, Attorney, Department of Justice, were on the brief, for the Respondent.

Filed December 6, 1961.

By Maris, Chief Judge.

The complainant, Aaron Rosenzweig, seeks a judgment setting aside and enjoining the enforcement of an order issued by the respondent, the Administrator of General Services. The order declared invalid the claims for meat subsidy filed by Central Packing Company for the months of February and March, 1945 and demanded restitution by the complainant of the amounts paid on the claims. The pertinent facts are undisputed and are as follows:

During 1944 Charles M. King, Hyman Stillman and Lou Segal entered into a partnership arrangement known

as Southern California Meat Company No. 2. Allied in this enterprise was Southern California Meat Co., Inc., a corporation principally owned by King. Southern California Meat Co., Inc. was to slaughter cattle and Southern California Meat Company No. 2 was to sell the meat. It appears that Southern California Meat Company No. 2 charged overceiling prices on the sale of meat and due to difficulties in obtaining subsidy payments the use of Southern California Meat Company No. 2 was abandoned.

In place of the previous partnership arrangement, Southern California Meat Co., Inc., King, Stillman and Segal late in 1944 entered into a similar arrangement under the name of Central Packing Company.[1] The name Central Packing Company was that of an existing business owned by the complainant, which had a slaughtering license. The Central Packing Company had a clean meat purchasing and selling record on the basis of which Stillman, Segal, King and King's corporation, Southern California Meat Co., Inc., could claim and receive subsidy payments. During February and March, 1945, Central Packing Company filed applications with Defense Supplies Corporation,[2] pursuant to Revised Regulation No. 3,[3] for cattle slaughter sub-

[1] It is not clear from the record whether the four above named or only Stillman and Segal were partners in this business. The facts as set out above are those alleged by the complainant and which are adopted by the respondent. For purposes of this review they are assumed to be correct.

[2] Prior to this period and until July 1, 1945 Defense Supplies Corporation acted as the paying or disbursing agent in respect to livestock slaughter subsidies. Sec. 5d of the Reconstruction Finance Corporation Act, as amended, 15 U.S.C.A. §606b, 6 F.R. 2972.

[3] 10 F.R. 4241, effective January 19, 1945.

sidy payments in the aggregate sum of $143,303.40. These subsidy claims, signed by the complainant as "Owner", and paid by Defense Supplies Corporation to Central Packing Company, are the subject of this controversy.

During February 1946, Southern California Meat Co., Inc., King, Stillman and Segal were indicted in the United States District Court for the Southern District of California, Central Division, No. 18,300, for violations of and conspiracy to commit violations of the Emergency Price Control Act of 1942 and the applicable regulations promulgated thereunder. It was charged that these defendants operated under the firm names of Southern California Meat Co., Inc., Southern California Meat Company No. 2, and Central Packing Company, and that they shared in all gains and profits accruing from the illegal activities described in the indictment. Among the overt acts were those charging the defendants with the issuance, during February and March, 1945, of certain invoices of Central Packing Company showing that meat had been sold at overceiling prices. On July 5, 1946 all four defendants were found guilty and judgments were entered against them. The complainant, while admittedly associated in the business of Central Packing Company, was never indicted or found guilty of any connection with such activities.

On December 23, 1947 a letter order was sent by Reconstruction Finance Corporation,[1] the agency then

[1] Defense Supplies Corporation was dissolved on July 1, 1945, and its functions transferred to Reconstruction Finance Corporation. Act of June 30, 1945, 59 Stat. 310, 15 U.S.C.A. §611 note. Revised Regulation No. 3, as amended, was then administered by Reconstruction Finance Corporation as the paying agent. 10 F.R. 11155.

in charge of such matters, addressed to Central Packing Company, in care of the complainant, stating that, as the result of an investigation, its subsidy claims were being declared invalid for the periods August 1944 through April 1945. Accordingly, demand was made for reimbursement of the sum of $190,962.62, plus interest. Under date of January 7 and 9, 1948, the complainant requested information with respect to the basis on which these claims were declared invalid. The parties treated the letter of January 9, 1948 as a formal protest against the letter order of December 23, 1947. Under date of January 16, 1948 the complainant was advised that the case had been referred to the U. S. Department of Justice and was being handled by the Legal Division of Reconstruction Finance Corporation.

No further action was taken until May 1958 when the United States filed a civil action, No. 423-58-BH, in the United States District Court for the Southern District of California, Central Division, against King, Stillman, Segal and the complainant doing business as Central Packing Company, and Southern California Meat Co., Inc., for the recovery of the subsidy payments in question. Default judgments were entered against defendants Stillman and Segal. The action against King and Southern California Meat Co., Inc., was dismissed. The action against the complainant was dismissed without prejudice on the ground that a protest against the letter order of December 23, 1947 was still pending. Under date of June 27, 1960 the com-

plaint against General Services Administration, the Administrator of which was the successor to Reconstruction Finance Corporation, seeking a determination of the pending protest and attacking the validity of the order on the ground that the complainant had not violated any applicable statutes or regulations.

Under date of August 4, 1960 the respondent informed the complainant that the claims of Central Packing Company for the period from August 1947 through January 1948 in the amount of $538,502.22 were being reinstated but that the February and March 1948 claims remained invalid because of the wilful violations of the Office of Price Administration regulations by Central Packing Company during those two months, which violations were confirmed by the criminal judgments entered against Segal and Stillman. The letter further stated that inasmuch as the Government had not been successful in its efforts to obtain restitution from Segal and Stillman of the grant-subsidy payments made to Central Packing Company, and since the complainant was a partner in Central Packing Company, demand was being made on complainant for restitution of the sum of $143,303.40, plus interest. This letter was treated by the respondent as a new order invalidating the claims and seeking recapture of the money paid to Central Packing Company, which super-

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Reconstruction Finance Corporation was abolished and its functions, with respect to the grant-subsidy program, were transferred to the respondent, the Administrator of General Services, effective June 30, 1957. Reorganization Plan No. 1 of 1957, 71 Stat. 647, 22 F.R. 4633, 15 U.S.C.A. § 601 note.

sealed the letter order of December 23, 1947. On August 15, 1950 the complainant protested the letter order of August 4, 1950 pointing out that neither he nor Central Packing Company had been indicted or convicted in the criminal proceeding referred to and that there never was any determination, judicial or administrative, that Central Packing Company or the complainant himself was in wilful violation of the regulations. Correspondence subsequently passed between the complainant and the respondent in which each expressed his views in respect to the liability of Central Packing Company and the complainant for restitution of the subsidy payments in question. The complainant's protest was denied on December 7, 1950 and the validity of the letter order of August 4, 1950 is here for review.

The interrelationship between the meat subsidy program and the price control program has frequently been discussed by this court and need not be recounted here. See Wm. Schluderberg—T. J. Kurdle Co. v. Reconstruction Finance Corp., 1948, 169 F. 2d 449, cert. den. 335 U. S. 856; Earl C. Gibbs, Inc. v. Reconstruction Finance Corp., 1948, 169 F. 2d 654; Merchants Packing Co. v. Reconstruction Finance Corp., 1949, 176 F. 2d 908; Evergreen Meat Co. v. Reconstruction Finance Corp., 1951, 188 F. 2d 368; Riverview Packing Co. v. Reconstruction Finance Corp., 1953, 207 F. 2d 415. It is sufficient to recall that the purpose of the subsidy program was to give relief to the meat slaughtering industry from a roll back in the maximum prices of meat. Earl C. Gibbs, Inc. v. Defense Supplies

Corporation, Em. App. 1946, 155 F. 2d 525, 529, cert. den. 329 U.S. 737.[7] In carrying out the purposes of the subsidy program, directives were given by the Economic Stabilization Director[8] to the Office of Price Administration in respect to maximum prices of meat, and to Defense Supplies Corporation, and after June 30, 1945, to its successor, Reconstruction Finance Corporation,[9] in respect to meat subsidy payments. Revised Regulation No. 3 of Defense Supplies Corporation, which governed the subsidy claims filed by Central Packing Company for February and March 1945, provided that claims should be paid on a purely preliminary basis but that Defense Supplies Corporation and later its successor, Reconstruction Finance Corporation,[10] should have the right to require restitution of such payments upon a finding that the claims were invalid or defective.[11]

The express authority to declare subsidy claims invalid for wilful violations of OPA regulations was contained in Section 7003.10(a) of Revised Regulation No. 3 and amendments thereto.[12] That section required a determination by the Price Administrator and the

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[7] During the period here involved the Economic Stabilization Director, who had been given the overriding authority over the entire subsidy program by Executive Order 9250, 7 F.R. 7871, issued Directive 28, effective January 29, 1945, 10 F.R. 522, and Directive 38 on March 21, 1945, which were superseded by Directive 41, effective April 24, 1945, 10 F.R. 4494.

[8] Amendment 2 to Directive 41, effective January 28, 1946, 11 F.R. 1215.

[9] Amendment 6 to Revised Regulation No. 3, effective July 1, 1945, 10 F.R. 11155.

[10] Subsection 7003.10(a) and (d) of Revised Regulation No. 3, 10 F.R. 4243.

[11] 10 F.R. 4243; 10 F.R. 8073, 10 F.R. 11153-11154.

others to whom the duty was subsequently delegated[11] that the subsidy applicant had wilfully violated an applicable regulation, or a certification by that officer that the subsidy applicant had been determined in a civil proceeding to have violated a substantive provision of an applicable regulation. Since there is no suggestion that the latter occurred in this case, we are concerned here only with the question of the validity of the determination by the respondent in the letter order of August 4, 1960, that the Central Packing Company had wilfully violated applicable regulations. Section 7(b)(1) of Directive 41 sets out the factors upon the presence of which the officer is to base his determination of a wilful violation. Section 7003.10(a) of Revised Regulation No. 3 must be construed in conformity with Section 7(b)(1) of the directive,[12] which provides in this connection that a recommendation by the Price Administrator or, later, the officer who succeeded him for the permanent withholding or recapture of subsidy payments because of wilful violation

[11] The authority to make such determinations ultimately was vested in the respondent, the Administrator of General Services, under the following sequence of events: The functions of the Price Administrator and the Economic Stabilization Director were transferred to the Temporary Controls Administrator by Executive Order 9809, issued December 12, 1946, 11 F.R. 14281, 50 U.S.C.A. Appendix § 601 note. Then the functions of the Temporary Controls Administrator with respect to subsidies were transferred to Reconstruction Finance Corporation when it became successor to Executive Order 9841, effective May 4, 1947, 12 F.R. 2645, 50 U.S.C.A. Appendix § 606 note. Finally, these functions were transferred to the respondent by Reorganization Plan No. 1 of 1957, 71 Stat. 647, 22 F.R. 4633, 15 U.S.C.A. § 640b note. Thus were coalesced in the Reconstruction Finance Corporation, and finally in the respondent, the responsibilities of both certification and payment.

[12] San Antonio Packing Co. v. Reconstruction Finance Corp., Em. App. 1959, 182 F. 2d 614, 618.

of the regulations may only be made after the conviction of the subsidy applicant in a criminal proceeding involving subsidy payments for the periods in question.[13]

The complainant attacks the validity of the letter order of August 4, 1960 on the ground that the respondent had no authority to make a determination that Central Packing Company had wilfully violated the price regulations. This argument is without merit. We have already set out the history of the coalescing in the Reconstruction Finance Corporation, and later in the respondent, of the responsibilities for both certification of price violations and recapture of subsidy payments.[14] As can be seen from the regulation and the directive, the respondent had the authority to make a determination of wilful violation and to order restitution of the subsidy payments from Central Packing Company for the periods involved in the convictions if the respondent was correct in finding that the criminal proceedings had terminated in the conviction of the subsidy applicant.

It is the complainant's contention that the criminal proceedings in which Southern California Meat Co., Inc., King, Stillman and Segal were convicted, did not terminate in the conviction of the subsidy applicant since Central Packing Company was neither indicted nor convicted as a separate entity in those proceedings. In support of this proposition the complainant relies upon United States v. A & P Trucking Co., 1958, 358 U. S. 121, in which the Supreme Court held that a

[13] Amendment 14 to Directive 48, issued by the Temporary Controls Administrator effective April 8, 1967, 32 F.R. 5807.

[14] See footnotes 2, 4, 5, 6 and 11.

partnership, as an entity, may be proceeded against under certain Federal statutes quite apart from the participation and knowledge of the partners as individuals. In arriving at this conclusion, the Court considered the pertinent statutes in the light of the purposes of the law involved in that case. However, the rule of the A & P Trucking Co. case is inapplicable here. That rule does not support the proposition that in 1946 the Government was required, in the criminal proceedings for wilful violation of OPA regulations to proceed against Central Packing Company, as an entity, for the crimes allegedly knowingly committed and participated in by the partners named in the indictment. Whether the Government could have done so we do not decide. It is true that under the regulation a partnership was included in the definition of person.[15] But this was merely a shorthand method of making clear that partnerships, as such, could file and receive payment of subsidy claims under the regulation. There was no provision in the Emergency Price Control Act which required a criminal proceeding for wilful violations of OPA regulations to be brought against a subsidy claimant partnership, as a separate entity, if the partners comprising the partnership had violated the Act in connection with the partnership business.

The respondent contends that the conviction of the individual partners must be considered a conviction of the partnership, the subsidy applicant Central Packing Company, for the purposes of Section 7(b)(1) of Di-

[15] § 7003.1 *Definitions.* "When used in the regulations in this part, the following terms shall have the following meanings:

"(a) 'Person' means an individual, corporation, partnership, association, institution, or other business entity, or legal successor or representative of any of the foregoing." 10 F.R. 4241.

rective 41. We agree with this contention. The complainant himself cites Jung v. Bowles, 9 Cir. 1946, 152 F. 2d 720, which supports this view. In that case, which involved a civil action for violations of the OPA regulation, the defendants, who were copartners, contended that liability rested on the partnership. The court, however, rejected their claim on the ground that under the law of California a partnership is not an entity distinct from its members.

The construction given Section 7(b)(1) of Directive 41 by the respondent carries out the spirit and intent of the subsidy program. For payment of subsidy was conditioned upon compliance by the slaughterer with the maximum prices applicable to his sales of meat. In Armour & Co. v. Reconstruction Finance Corporation, 1947, 162 F. 2d 918, 922, this court had occasion to point out that the purpose of Section 700.310 (a) was not to penalize violators but to prevent the diversion of subsidy funds from the accomplishment of the object for which they were intended. The object was to implement the price control program by supplementing the ceiling prices to be received by slaughterers for their meat to the extent necessary to make these prices generally fair and equitable. It was obviously not in accord with that purpose to pay a slaughterer any subsidy for a period in which it had been judicially determined that he had obtained from his sales of meat amounts in excess of the ceiling prices fixed under the price control program. So to provide was not to impose a penalty but merely to deprive the slaughterer of subsidy funds to which he was not entitled.

We hold that the respondent's determination that Central Packing Company was in wilful violation of the

OPA regulations is amply supported by the results of the criminal proceeding in which individual partners of the partnership, Central Packing Company, were convicted of such wilful violations and that the respondent did not err in his letter order of August 4, 1950 in making such a determination and thereupon holding invalid the subsidy claims of Central Packing Company for February and March 1945.

The complainant earnestly urges that he should not be held personally liable for restitution of subsidy payments which the respondent contends are due and owing from Central Packing Company. The letter order of August 4, 1950, invalidating the subsidy claims, however, does not purport to determine the complainant's liability for such restitution and the respondent concedes that he could not issue an order imposing liability for repayment upon the complainant personally. All that the letter order of August 4, 1950 does in this connection is to assert as a matter of law that the complainant as a partner in Central Packing Company is liable for its debts, and to demand payment from him on this theory and threaten legal action if he fails to make such payment.

The complainant contends, however, that he is wholly innocent of the illegal activities of the other partners of Central Packing Company, that he did not receive any part of the subsidies in question, that as to these transactions he was not a partner, and that the respondent is seeking to hold him liable for the criminal acts of others. It may well be that these contentions of the complainant are well founded. We intimate no opinion upon their merits, however, since this court is without power to adjudicate these questions.

Our jurisdiction is derived solely from the Emergency Price Control Act which authorizes us to consider the validity of regulations and orders issued under section 2 of the Act. The letter order of August 4, 1960 was such an order and, therefore, within our jurisdiction to the extent that it determined the validity of the subsidy claims of Central Packing Company, the amounts paid to it on invalid claims, and ordered restitution to be made by Central Packing Company as subsidy applicant. But when in that letter the respondent discussed the liability of the complainant to pay the Central Packing Company's restitution debt to the Government, he entered a field in which he was not authorized by Section 2 of the Act to make an order which would be reviewable in this court and nowhere else. That part of the letter, consisting of its last three paragraphs, is, therefore, in no sense an order under Section 2 of the Act which was protestable by the complainant and reviewable by this court. The fact that the complainant did protest the entire letter of August 4, 1960 is immaterial since the protest was wholly ineffective to give this court jurisdiction to review the last three paragraphs to which we have referred. It necessarily follows that the liability of the complainant to pay the Central Packing Company's debt to the Government may be determined in an action for restitution hereafter brought by the Government against the complainant in any court having jurisdiction of the action. In such an action the complainant will have full opportunity to assert and establish if he can, any defenses to the Government's claim against him to which he may believe himself entitled, except the validity of

respondent's determination that Central Packing Company's subsidy claims for February and March 1945 are invalid[17] and that the Government is entitled to restitution for the sums paid to Central Packing Company on those claims. Since the facts admitted in this case indicate that with respect to the transactions out of which those claims arose Central Packing Company was a partnership, it is clear that the Government is entitled to restitution from those persons who were partners with respect to those transactions if, as appears to be the case, the partnership assets were insufficient for that purpose. As we have stated, however, we are not authorized to, and do not, decide whether the complainant is one of those persons.

The complainant also raises the question of the application of the doctrine of laches on this review. It is true that this case involves ancient history. The original letter-order of invalidation dates back to December 23, 1947 and it was protested on January 19, 1948. The civil action for restitution was not brought until ten years later. The complainant says that this delay has prejudiced him in that records are lost and important witnesses have become unavailable. Again the complainant raises an issue which goes to the defense of his case.[18] Whether or not such a defense is appropriate under the circumstances is a matter upon which we do not pass and which can be raised hereafter in a restitution suit, if one is brought against the complainant. We observe, however, that the doctrine of laches is unavailable in respect to delay in the protest

[17] Yakus v. United States, 1944, 321 U.S. 414, 427-434.

[18] See Riverview Packing Co. v. Reconstruction Finance Corp., 8 Cir., 1953, 207 F. 2d 361, 366-368.

procedure in view of the fact that Section 203(d) of the Emergency Price Control Act of 1942, as amended,[19] provided for a judicial remedy in this court in case of unreasonable delay in administrative action upon a protest.

Since we find no error in those portions of the letter order of August 4, 1960 which we have authority to review a judgment will be entered dismissing the complaint.

A true copy.

(Seal)

Teste, J. Fredrick Mattingley, Acting Clerk.

J. Fredrick Mattingley

Judgment.

United States Emergency Court of Appeals

No. 670.

Aaron Rosenzweig, Complainant v. General Services Administration of the United States of America, Bernard L. Boutin, Administrator, Respondent

Present: Maris, Chief Judge, and Magruder and McAllister, JJ.

This cause came on to be heard on the complaint, answer and transcript of administrative proceedings, and was argued by counsel.

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[19] The Act of June 30, 1944, 58 Stat. 632, added subsection (d) to section 203 of the Emergency Price Control Act of 1942, as

Upon consideration whereof, It Is Ordered, Adjudged and Decreed that the complaint herein be and it is hereby dismissed.

By the Court: Albert B. Maris, Chief Judge.

December 6, 1961.

(Seal) A true copy. Teste: J. Fredrick Mattingley, Acting Clerk.

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING.

United States Emergency Court of Appeals
No. 670.

Aaron Rosenzweig: Complainant v. General Services Administration of the United States of America, Bernard L. Boutin, Administrator, Respondent.

Present: Maris, Ch. J. and Magruder and McAllister, JJ.

Upon consideration of the complainant's petition for rehearing It Is Ordered that the opinion filed in the above entitled case on December 6, 1961, is amended by striking out in lines 17 and 18 on page 12 of the printed opinion the words "it is clear" and inserting in lieu thereof the words "the court in which the restitution suit is brought may conclude after considering the applicable law."

It is further Ordered that the petition for rehearing is denied.

By the Court. Albert B. Maris, Chief Judge.

January 2, 1962.